New York Law Publishing Company, a subsidiary of American Lawyer Media, Inc. *and* New York Typographical Union No. 6, CWA, Local 14156, AFL–CIO. Case 2–CA–33808–1

November 2, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

Pursuant to a charge filed on May 29, 2001,[1] the General Counsel of the National Labor Relations Board issued a complaint on July 5, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 2–RC–22319. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, with affirmative defenses, admitting in part and denying in part the allegations in the complaint.

On August 23, 2001, the General Counsel filed a Petition for Summary Judgment and Memorandum in Support. On August 28, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.[2] The Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer, the Respondent denies that it has refused to bargain and attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding. The Respondent alleges as affirmative defenses that the unit certified by the Regional Director in Case 2–RC–22319 is inappropriate for purposes of collective bargaining and that the Certification of Representative describes a bargaining unit different from, and broader than, the unit in which a representation election was conducted.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

In its response to the Notice to Show Cause, the Respondent also argues that the Regional Director's determination in the representation proceeding that the art director was not a supervisor was based on, among other things, a flawed interpretation of Section 2(11) that was rejected by the Supreme Court in *NLRB v. Kentucky River Community Care, Inc*., 121 S.Ct. 1861 (2001). Further, the Respondent asserts that because the art director was permitted to vote subject to challenge and her challenged ballot was not determinative of the outcome of the election, the issue of her supervisory status has never been decided by the Board, and the inclusion of this supervisory position in the unit renders the unit inappropriate.

As noted by the Respondent, the issue of the art director's supervisory status has not been determined by the Board, and therefore any potential conflict between the Regional Director's determination and the Supreme Court's decision is not at issue here. Further, under standard Board practice, when a classification of employees votes under challenge and their challenged ballots are not determinative of the election results, that classification is neither included in nor excluded from the unit. However, the issue need not stay unresolved. The parties may agree through the course of collective bargaining on whether the classification should be included or excluded. Alternatively, in the absence of such an agreement, the matter can be resolved in a timely invoked unit clarification proceeding. See *DIC Entertainment, LP*, 329 NLRB 932 (1999), enfd. 238 F.3d 434 (D.C. Cir. 2001); *Orson E. Coe Pontiac-GMC Truck, Inc.*, 328 NLRB 688 (1999); *Kirkhill Rubber Co.*, 306 NLRB 559 (1992); *NLRB v. Dickerson-Chapman, Inc.*, 964 F.2d 493, 496–497, 500 fn. 7 (5th Cir. 1992).

As indicated above, the Respondent contends further that the unit description in the Certification of Representative is too broad. The Respondent first raised this issue regarding the unit description on May 24, 2001, several days after the issuance of the Certification of Representative. Specifically, the Respondent contended that the unit description inappropriately failed to limit the term "production employees" to "advertising production employees," and requested that the Regional Director modify the unit description accordingly.

[1] Although the Respondent states in its answer to the complaint that it is without knowledge or information sufficient to form a belief as to the date the charge was filed and served, it is clear from the exhibits attached to the General Counsel's motion that the charge was filed and served as alleged. The Respondent has not challenged the authenticity of those exhibits.

[2] The Union filed a brief in support of the General Counsel's petition.

By letter dated August 14, 2001, the Regional Director denied the Respondent's request. The Regional Director noted that in footnote 4 of the Decision and Direction of Election, she had rejected the Respondent's reference to the production employees as the "advertising production employees" because the Respondent's organizational chart indicated that the production department encompassed the composing room employees as well as the advertising production employees. She further noted that no request for review was filed on this issue, although review was requested on other issues raised by the Decision and Direction of Election.

In addition, the Regional Director noted that the *Excelsior* list provided by the Respondent for the election contained the unit employees as defined by the Decision and Direction of Election, and that there were no challenges to any ballots or any subsequent objections to the election asserting any confusion among the voters concerning their eligibility to vote. Further, the unit description in the Certification of Representative is the same as that set forth in the Decision and Direction of Election. The Regional Director concluded: "The parties had ample opportunity to fully litigate all issues in this case. No issue regarding the unit description was raised prior to the election and no issues arose during the election to establish uncertainty as to who was eligible to vote in the election."

For the reasons stated by the Regional Director, we find that the appropriate unit is as stated in the complaint and Certification of Representative. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[3] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with an office and place of business located at 345 Park Avenue South, New York, New York, has been engaged in the business of publishing newspapers and other periodicals, primarily in the legal community.

Annually, in the course and conduct of its operations, the Respondent generates gross revenues in excess of $500,000 and purchases goods and materials valued in excess of $50,000, directly from suppliers located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held May 9, 2001,[5] the Union was certified on May 21, 2001, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Included: All full-time and regular part-time production and editorial employees employed in the New York Law Journal Division of the Employer.
>
> Excluded: All other employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On or about May 11 and 22, 2001, the Union, by letters, requested the Respondent to bargain,[6] and, since May 25, 2001, the Respondent has refused.[7] We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after May 25, 2001, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting

[3] Chairman Hurtgen dissented from the denial of the Respondent's Request for Review in the underlying representation case. While he continues to be of the view that review was warranted, he agrees that the Respondent has not presented any new matters which would warrant denial of the Motion for Summary Judgment.

[4] The Respondent's request that the complaint be dismissed is therefore denied.

[5] The complaint inadvertently refers to the date of the election as May 11, 2001.

[6] In its answer, the Respondent denies that the Union requested the Respondent to bargain. However, the Respondent admits the existence of letters from the Union to the Respondent, dated May 11 and May 22, 2001, and "refers to those letters for their contents." The letters, which the General Counsel attached to his motion, both request that the Respondent contact the Union to schedule a mutually convenient time for an initial bargaining session. Accordingly, we find that the Respondent's denial does not raise a material issue of fact warranting a hearing.

[7] In its answer, the Respondent denies that it has refused to bargain with the Union. However, the Respondent admits the existence of a May 25, 2001 letter from it to the Union and "refers to that letter for its contents." The letter, which the General Counsel attached to his motion, states that the Respondent "declines your invitation to commence collective bargaining in the unit as presently constituted." Accordingly, we find that the Respondent's denial does not raise a material issue of fact warranting a hearing.

commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, New York Law Publishing Company, a subsidiary of American Lawyer Media, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with New York Typographical Union No. 6, CWA, Local 14156, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and regular part-time production and editorial employees employed in the New York Law Journal Division of the Employer.
>
> Excluded: All other employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 25, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 2, 2001

Peter J. Hurtgen ,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with New York Typographical Union No. 6, CWA, Local 14156, AFL–CIO,

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

Included: All full-time and regular part-time production and editorial employees employed in our New York Law Journal Division.

Excluded: All other employees, guards and supervisors as defined in the Act.

NEW YORK LAW PUBLISHING COMPANY, A SUBSIDIARY OF AMERICAN LAWYER MEDIA, INC.